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Case Western Reserve Journal of
International Law

Volume 32 | Issue 1

2000

The Russian Death Penalty Dilemma: Square Pegs and Round Holes

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THE RUSSIAN DEATH PENALTY DILEMMA: SQUARE PEGS AND ROUND HOLES

*Khadine L. Ritter**

"Our fatal troika dashes on in her headlong flight perhaps to destruction and in all Russia for long past men have stretched out imploring hands and called a halt to its furious reckless course. And if other nations stand aside from that troika they may be not from respect, as the poet would fain believe, but simply from horror. And well it is that they stand aside, but maybe they will cease one day to do so and will form a firm wall confronting the hurrying apparition and will check the frenzied rush of our lawlessness, for the sake of their own safety, enlightenment and civilization."

-Fyodor Dostoevsky

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INTRODUCTION

Europe has been developing into a nearly uniform anti-death penalty continent for over a century. Today, only a handful of European states retain the death penalty as punishment for murder.¹ European abolitionist sentiment is so strong that it has become a prerequisite to membership into regional organizations in the continent.² The growing international trend to abolish the death penalty is confirmed by the number of international conventions and agreements aimed at abolishing or restricting the use of the death penalty over the last thirty years.³ The European Community alone has published well over 300 position documents encouraging or concerning

¹ See Roger Hood, *The Death Penalty: The USA in World Perspective*, 6 J. TRANSNAT'L L. & POL'Y 517, 525 (1997).

² In 1994, the Council of Europe officially resolved that "the willingness to ratify the [Sixth] [P]rotocol [to the Convention for the Protection of Human Rights and Fundamental Freedoms] be made a prerequisite for membership of the Council of Europe." Parliamentary Assembly of the Council of Europe, 1994 Sess., Recommendation 1246 (1994) On the Abolition of the Death Penalty, Resolution 1044 (1994) On the Abolition of Capital Punishment, para. 6; *see also* Resolution 1097 (1996) On the Abolition of the Death Penalty in Europe (visited Feb. 12, 1999) <<http://www.coe.fr/ta/ta96/eres1097.htm>>.

³ See American Convention on Human Rights to Abolish the Death Penalty, June 8, 1990, Protocol, art. I, 29 I.L.M. 1447, 1448 (1990) [hereinafter American Convention on Human Rights]; G.A. Res. 32/61, U.N. GAOR, 32d Sess., Supp. No. 45, at 136, U.N. Doc. A/32/45 (1977); Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty, Apr. 28, 1983, Protocol No. 6, Europ.T.S. No. 114, *reprinted in* 22 I.L.M. 538 [hereinafter Protocol No. 6]; Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty, G.A. Res. 44/128, U.N. GAOR, 3d Comm., 44th Sess., 82d Plen. Mtg., U.N. Doc. A/RES/44/128 (1990).

the abolition (or lack thereof) of the death penalty.⁴ Accession to such agreements is generally forthcoming from countries seeking closer ties with their wealthier and more developed neighbors while attempting to retain some semblance of sovereign jurisdiction in the sphere of domestic penal law. However, for many former Eastern Bloc states, this necessary pill is hard to swallow. The persuasive, almost coercive, force with which the major European nations attempt to exact compliance and the sanctions threatened for non-compliance would, in most other scenarios, elicit severe retaliation from the bullied nations.⁵ The threatened eastern European state, however, is rarely in a position to retaliate.

Since April 28, 1983, the Council of Europe has demanded that its members abolish the death penalty by signing and ratifying Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms (Convention). Soon after its implementation, this Convention became a prerequisite to membership into the Council.⁶ The Protocol requires the abolition of the death penalty in every Member State.⁷ Russia has been a Member State since 1996 but has not yet ratified the Protocol.⁸ The Protocol is a knife in Russia's side that the Council continues to twist as a review of Russia's membership approaches in 1999.

Part I of this Note specifically examines the dilemma in which the Council of Europe and the Russian Federation find themselves regarding Russia's membership to the Council notwithstanding its inability to ratify Protocol No. 6 of the Convention. The section discusses the importance of membership in the Council, describes additional membership criteria and explains the Council's position on the death penalty. Part I then considers Russia's desire to maintain its membership in the Council, the current status of Russia's compliance with the Council's demands, as well as Russia's justifications for the continued use of capital punishment. The Council has thus far been ineffective in compelling other Member States such as Ukraine to expediently fulfill their obligations. This weakness undermines

⁴ Most of these documents are addressed to nations not within the Community. In fact, as recently as June 12, 1998, the E.U. published a document denouncing the execution of Karla Faye Tucker in the state of Texas.

⁵ For example, early in 1997, the Council threatened Russia with an ultimatum: either it imposed a moratorium on executions or the Russian delegation's voting powers would be suspended during the 1998 sessions. See Svetlana Sukhova & Vitaly Dymarsky, *Europe Tries to Scare Russia with Death Penalty*, KOMMERSANT DAILY, Jan. 31, 1997, at 2.

⁶ See Parliamentary Assembly of the Council of Europe, *supra* note 2.

⁷ See American Convention on Human Rights, *supra* note 3.

⁸ See Council of Europe Chart of Signatures and Ratifications, Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty (visited July 7, 1999) <http://www.coe.fr/tablconv/114t.htm>.

the council's credibility, and it may prevent the Council from exerting pressure on non-compliant states. In closing, Part I presents a case study of Ukraine's standing in the Council despite its failure to honor its commitments, as well as an assessment of the sanctions available to the Council and its failure to employ those sanctions on Member States.

In light of the unique circumstances the Russian Federation now faces, this Note proposes that Russia should not be given an ultimatum to compel it to abolish the death penalty. Instead, the Council's efforts to address human rights abuses in Russia would be best directed to helping Russia develop and modernize its criminal justice procedures and its penal system before asking it to modify its penal code. Part II offers three alternative solutions that the Council can implement to address Russia's current deficiencies as well as three suggestions the Federation may consider to remedy its own membership record.

I. THE DOUBLE-EDGED DILEMMA: THE COUNCIL V. THE RUSSIAN FEDERATION

The dilemma presents itself as a double-edged sword. The Council of Europe is committed to the pursuit of human rights throughout the whole of Europe, and in so aspiring, demands that its members adhere to strict standards of conformity.⁹ Russia, now a member of the Council, seeks acceptance by the capitals of Western Europe, but is not yet prepared to abolish the death penalty for a number of reasons, none of which the Council finds compelling.

A. *The Council of Europe as a Regional Institution*

The Council of Europe (Council) should not be confused with the European Council, the European Union's (E.U.) chief decision-making body.¹⁰ The Council is an independent regional body whose membership includes all the members of the European Union. Founded in 1949 by eleven western European states, the Council of Europe's aim is to "achieve a greater unity between its members for the purpose of safeguarding . . . their common heritage and facilitating their economic and social progress."¹¹ According to Articles III and IV of the Statute of the Council of Europe, for membership into the organization an applicant state must be

⁹ See Daniel Tarschys, Secretary General of the Council of Europe, Speech on the Occasion of the Accession of Russia to the Council of Europe, Strasbourg, Feb. 28 1996, (visited Nov. 9, 1998) <http://www.coe.fr/dossiers/adhesion/russia_s.html>.

¹⁰ See Joel Blocker, *Europe: Council of Europe – A Leading Gateway to Integration* (visited Sept. 13, 1999) <<http://www.rferl.org/nca/features/1997/11/f.ru.971111154036.html>> [hereinafter *Gateway*].

¹¹ Statute of the Council of Europe, May 5, 1949, Europ.T.S. No. 51, at 2.

willing to promote human rights and fundamental freedoms within its jurisdiction as well as to collaborate with the realization of the Council's aim.¹² The membership criteria as specified by these founding articles is rather vague and hardly comprehensive. Through the years, a demanding set of membership criteria has evolved through the use of multilateral treaties and conventions, including specific human rights agreements.

On November 4, 1950, the Council bound each of its members to the Convention and has since succeeded in acquiring the signatures of all new members as well.¹³ These signatures, however, represent a commitment to the Convention as a whole, but not necessarily to each of the separate protocols subsequent to the Convention which require separate signatures. In 1983, the Council added Protocol No. 6 to the Convention, demanding the abolition of the death penalty, and likewise asked that all members sign and ratify the Protocol. In fact, since 1994, the Parliamentary Assembly of the Council has required that accession to the Protocol become a prerequisite for membership.¹⁴ As of January 27, 1999, ten Member States had failed to either sign the Protocol or ratify it, including a founding member, the United Kingdom.¹⁵

Many candidates for membership, especially former Communist countries, hope to use the Council as an avenue toward greater integration with western Europe and eventual membership in the E.U.¹⁶ It is generally understood that entrance into the E.U. is hardly an effortless task or a speedy process. One E.U. official even admitted that, "Joining the E.U. is more complicated than joining NATO or the Council of Europe."¹⁷ Despite cooperative assistance programs the E.U. has implemented for former Communist states, these states are not yet able to meet the complex set of criteria the E.U. demands for membership.¹⁸ As Brussels takes its time to review applications for adherence to the intricate maze of formal requirements for E.U. membership, the seat of the E.U. also seeks an informal, undisclosed yet understood approving (or disapproving) nod from another organization. While the E.U. reviews compliance with economic and political criteria for membership, it defers review of applicants' human rights records to the Council of Europe. In other words, Brussels makes it clear that human rights abuses will not be tolerated, and applicants must

¹² See *id.* arts. 3,4.

¹³ Among other things, the Convention declares that "abolition of the death penalty" is a "fundamental freedom." See Protocol No. 6, *supra* note 3.

¹⁴ See *supra* text accompanying note 2.

¹⁵ See Council of Europe Chart of Signatures and Ratifications, *supra* note 8.

¹⁶ See *Gateway*, *supra* note 10.

¹⁷ Joel Blocker, *E.U. Promises Most, Delivers Least to the East* (visited Sept. 13, 1999) <<http://www.rferl.org/nca/features/1997/11/f.ru.971111153853.html>>.

¹⁸ See *id.*

obtain "a sort of seal of human rights approval by gaining admission into the Council of Europe."¹⁹ Interestingly enough, all individual members of the E.U. who are simultaneously members of the Council of Europe have ratified the European Convention for the Protection of Human Rights, yet the E.U. itself, as an individual institution, has not yet ratified the Convention.²⁰

In effect, the Council of Europe has become the E.U.'s human rights regulatory arm, incorporating numerous Council charters, declarations and standards into its own body of laws and requiring that Member States comply with its sister organization's bylaws.²¹ As the main promoter of democracy, the rule of law, and human rights in Europe, the Council has come to be recognized by many especially in the East as the "gateway" organization for integration in the E.U.²² In fact, the Council was the first European regional organization to extend membership to Eastern states. With that in mind, the importance of the Council of Europe for those states striving for E.U. membership becomes much clearer.

B. *The Council's Position on Capital Punishment*

As a European body, the Council's abolitionist sentiment really reaches as far back in time as the Enlightenment. The Enlightenment, also known as the Age of Reason, was the dominant intellectual movement of the 18th century. Enlightenment thinkers such as Voltaire and Montesquieu were powerful influences for the reformation of penal systems throughout Europe.²³ These philosophers shared the Enlightenment's faith in the supremacy of human reason, believing that people, through the use of reason, could find answers to their questions and solutions to their problems. Thus, to Enlightenment thinkers the death penalty was the ultimate crime against humanity, since they recognized the finality of the punishment and the absolute deprivation of the exercise of intellectual

¹⁹ MICHAEL G. ROSKIN, *THE REBIRTH OF EAST EUROPE* 186 (2d ed., 1994); see also David Buchan, *Leaders Meet on Rights*, FIN. TIMES, Oct. 10, 1997 (noting that the Council's second summit in its 48-year history turned its human rights court into a full time body, appointed a human rights mediator, and encouraged more members, particularly in eastern Europe, to sign the Council's social charter).

²⁰ See Jean M. Sera, Note, *The Case of Accession by the European Union to the European Convention for the Protection of Human Rights*, 14 B.U. INT'L L. J. 151, 151-52 (1996).

²¹ See Resolution on Respect for Human Rights in the European Union, 1997 O.J. (C 132) 31. Issues developed by the Council that have been incorporated into the E.U. laws include: standards regarding female prisoners, child labor laws, prison standards, racial discrimination and provisions on ethnic and linguistic minorities.

²² See *Gateway*, *supra* note 10.

²³ See *Britannica Online*, Entry for "Capital Punishment" (visited Feb. 2, 1999) <<http://www.search.eb.com>>.

freedom. In this context, some members of the Council of Europe have identified a serious difference between the former Soviet states and the rest of Europe. Slavic nations, not having been "imbued with the light of thinkers like Voltaire," have suffered through histories of "imminent negativity" noted one member of the Parliamentary Assembly of the Council.²⁴

Today, the most popular arguments against the death penalty revolve around the issues of deterrence²⁵ and the moral considerations of using capital punishment as retribution. Beyond these specific concerns, some abolitionists also point to the possibility of error in sentencing,²⁶ as well as misgivings about judicial discretion.

At least one Russian government official believes that as much as 15% of executions were later discovered to have been erroneous.²⁷ The most famous case in Russia occurred when the infamous "Rostov Ripper," Andrei Chikatilo, was arrested twelve years after another man had been executed for Chikatilo's crimes.²⁸ Chikatilo had committed at least forty unusually sadistic sexual murders where many of the victims were children.²⁹ Not surprisingly, this particular case was met with much the same reaction from both sides of the debate. Even Anatoly Pristavkin, Chairman of the Presidential Clemency Commission, said people like Chikatilo are "the spawn of the devil" and "must be eliminated."³⁰ To be sure, before endorsing this view, abolitionists first point to the tragic execution of Chikatilo's innocent stand-in.

Abolitionists also argue about the possibility of wide judicial discretion. As will be discussed later, judges in Russia have tremendous discretion over trial proceedings and can therefore limit the amount or kind of evidence and testimony admitted for trial. Abolitionists fear that judges may use this power to ride the political wave.³¹ Although judges are appointed for life, these are political appointments and as such, public outcry may carry disproportionate weight, resulting in a lack of uniformity in sentencing from region to region.

²⁴ Council of Europe Parliamentary Assembly, Report of 1997 Ordinary Session (First Part), *Executions of Death Sentences in Russia and Ukraine*, Jan. 29, 1997, 5th sitting (visited Feb. 19, 1999) <<http://www.coe.fr/verbatim/9701/970129pmp4.htm>>.

²⁵ See *Capital Punishment*, *supra* note 23.

²⁶ See *id.*

²⁷ See Donald D. Barry & Eric J. Williams, *Russia's Death Penalty Dilemmas*, 8 CRIM. L.F. 231, 253 (1997).

²⁸ See Carey Scott, *Death Row Swell in Russia*, SUNDAY TIMES (London), Oct. 13, 1996, at 15.

²⁹ See Barry & Williams, *supra* note 27, at 254.

³⁰ *Id.* at 254-55.

³¹ See *id.* at 253.

There is very little conclusive data available regarding the deterrent effects of capital punishment in Russia. If public polls are any indication, Russians overwhelmingly believe the punishment is a deterrent. If the polls provide some insight about this Russian sentiment, then, to some degree one can also infer that Russians believe in retribution. According to the retributionist view, the only point of the death penalty is to pay criminals back for their actions, even if it does not prevent future crime. But abolitionists like Andrei Sakharov firmly believe that this sentiment "contradicts moral sensibility" and "cannot be justified by any general social considerations."³²

Much of the Council's objection specifically to Russia's continued use of the punishment stems from the country's historical use of it and the sheer number of executions carried out in Russia. Since the death penalty was reinstated in the mid-1950s, Russia has had one of the highest execution rates in the world.³³ According to the Death Penalty Review Commission, Russia has executed at least 1200 people in the last decade, nearly three times as many executions than in the United States over the last twenty years.³⁴

At its core, the most salient reason the Council of Europe opposes capital punishment is the contemporary belief that, "[a]bolition of the death penalty is the mark of a civilized society and a civilized Europe."³⁵ The Council seems to presume that all European states can fit into one Pan-European mold, and this, indeed, is the founding objective of the Council, as well as of the E.U. However, Russia may never fit into the western European mold no matter how much European-minded Catherine the Great or Peter the Great would have liked.³⁶

C. *The Russian Dilemma*

On the other side stands the Russian Federation with one million prisoners, seven hundred of whom are on death row.³⁷ Suffering under what

³² Robert A. Kushen, *The Death Penalty and the Crisis of Criminal Justice in Russia*, 19 BROOK. J. INT'L L. 523, 562 & n. 155 (1993) (citing ANDREI D. SAKHAROV, SAKHAROV SPEAKS 240 (Harrison Salisbury ed., 1974)).

³³ See Scott Kraft, *Executions Accelerate in Russia*, L.A. TIMES, May 1, 1996, at A6.

³⁴ See *id.*

³⁵ See Council of Europe Press Service, *UK Signature of European Protocol Banning the Death Penalty an "Important Step,"* (Jan. 27, 1999) (visited Sept. 14, 1999) <[http://www.coe.fr/cp/99/50a\(99\).htm](http://www.coe.fr/cp/99/50a(99).htm)>.

³⁶ Cf. ISABEL DE MADARIAGA, *RUSSIA IN THE AGE OF CATHERINE THE GREAT* 32 (1981) (discussing how Catherine sought to cover up her husband's murder).

³⁷ See Chris Bird, *Amnesty Mulled for Almost Half Russia's Prisoners*, Reuters, May 28, 1997, on file with the *Case Western Reserve Journal of International Law*; Helen Womack, *Council Accession Too Late for Death-row Inmate*, IRISH TIMES, Mar. 4, 1996, at 10.

may be considered the most desperate economic crisis of the decade, Russia would greatly appreciate some manner of approval from the E.U. or the Council. However, it is also very reluctant to honor some of its commitments along this yellow brick road to the E.U. Russia continues to tiptoe carefully and reluctantly around its obligations as a new member of the Council since 1996. Its major challenge is Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms Concerning Abolition of the Death Penalty.

Central and Eastern Europe will not survive without access to Western Europe's markets. Complete access to these markets basically entails membership in the European Community.³⁸ Currently, there is some level of cooperation between the eastern states and the E.U., including the Partnership and Cooperation Agreement signed with Russia, as well as the Technical Assistance for the Commonwealth of Independent States (CIS) program signed with the CIS.³⁹ However, if the former Soviet Union wishes to retain any influence in Central and Eastern Europe and improve trade relations in the continent, Russia will have to take steps to cement ties to Western Europe and join the major regional organizations such as the Council of Europe or the E.U.⁴⁰

Since 1989, the Russian Federation has recognized the significance of belonging to "a common European house."⁴¹ Not only does Russia have a strong assertion that "Russia is part of Europe, a legitimate child and not a bastard," but according to Communist leader Gennady Zyuganov, Russia also has a justifiable worry that it may be left behind in the scramble to impress the E.U.⁴² This is especially true since at least ten East European nations are currently candidates for membership to the E.U. and Russia is not even on this list.⁴³

President Yeltsin is caught between an intense desire for his country to be looked upon favorably by the Council and his equally important responsibility to a polity that overwhelmingly supports the death penalty. Not only would abolition of the death penalty incur political costs, the economics of building prisons for life sentences is a likewise daunting task.

³⁸ See MICHAEL G. ROSKIN, *THE REBIRTH OF EAST EUROPE* 194 (2nd ed., 1994).

³⁹ See European Union Press Release, *European Commission Makes First Assessment of Russian Crisis*, 77/98, 1998 O.J. (visited Nov. 10, 1998) <<http://www.e....org/news/press/1998-3/pr77-98.html>>. This document is on file with the Case Western Reserve Journal of International Law.

⁴⁰ See R. St. J. Macdonald, *The Entry of New Member States Into the Council of Europe*, 91 ASIL PROC. 523, 523 (1997).

⁴¹ See *id.*

⁴² John Palmer, *Russia Set to Join Council of Europe Despite Chechen War*, GUARDIAN (London), Jan. 25, 1996, at 11, available in LEXIS, News Library, Guardian File.

⁴³ See Blocker, *supra* note 17.

There are, of course, some serious doubts among high-ranking Russian officials regarding the benefits to membership in the Council of Europe at a time when Russia is not prepared to accede to all of the Council's demands. Albert Makashov of the Communist faction believes that Russia has not yet received anything from its membership to the Council.⁴⁴ Furthermore, membership to the Council is costing Russia \$24 million a year, and will require a number of adjustments in domestic law.⁴⁵ This alone has raised serious doubts within the Liberal Party about the Council's demands.⁴⁶

Nevertheless, the Council of Europe granted membership status to Russia on January 27, 1996 by an overwhelming majority, making it the thirty-ninth Member State.⁴⁷ While Russian membership was welcomed almost unanimously, the Council recognized that Russia still had far to go to comply with many of the Council's requirements for membership.⁴⁸ Russia's application for membership was granted even though a report by the main rapporteur of the Council's Parliamentary Assembly expressed serious concerns regarding Russia's application after a visit to Russia in early January 1996.⁴⁹ The report concluded that Russia could not be considered a law-governed state and that it had not yet met the stringent membership criteria set forth in Articles 3 and 4 of the Council's charter.⁵⁰ Despite these concerns, the Council voted to approve Russia's membership with the hope that this would shore up Yeltsin's standing before the 1996 elections as well as influence pro-western reform of human rights.⁵¹ At the time, President Yeltsin warned that "failure to admit Russia would be a serious setback for reforms," and "would be interpreted as a refusal to support those who are fighting for democratic principles . . . in Russia."⁵²

1. Russia's Membership in the Council and Additional Membership Criteria

Russia has been a full member since February 1996, but it remains closely scrutinized and continues to be in danger of expulsion until it fulfills its obligations to the Council. Russia has been dragging its heels on the

⁴⁴ See *Duma Ratifies Human Rights Convention, Keeps Death Penalty*, Interfax Russian News, Feb. 23, 1998, available in LEXIS, News Library, Russia File.

⁴⁵ See *id.*

⁴⁶ See *id.*

⁴⁷ See *Russia is Accepted Into the Council of Europe*, RUSSIA & COMMONWEALTH BUS. L. REP., Feb. 14, 1996, at 7.

⁴⁸ See Macdonald, *supra* note 40, at 523-26.

⁴⁹ See Vladimir Mikheyev, *Russia Doesn't Have Enough Lawyers to Join Council of Europe*, IZVESTIA, Jan. 16, 1996, at 3.

⁵⁰ See *id.*

⁵¹ See Palmer, *supra* note 42.

⁵² Chrystia Freeland, *Yeltsin Warns on Council Bid*, FIN. TIMES, Jan. 24, 1996, at 3.

death penalty issue. In fact, after gaining membership into the council, it took President Yeltsin another three months to issue a decree asking the Duma for a "gradual curtailing of . . . the death penalty," giving the Council an indication that Russia's commitment was rather feeble.⁵³ The decree was passed with the understanding that the provisions were recommendations from the Council and not actually binding obligations.⁵⁴ Furthermore, due to intense pressure from legislators, the Russian Supreme Court and other government officials, the decree contained no mention of the death penalty moratorium required by the Council.⁵⁵ By March, 1997, an official moratorium was introduced to the Duma where it was defeated, and thereafter, the Duma passed a new Criminal Code retaining this form of punishment.⁵⁶

Even if Russia was able to institute an official moratorium or even abolish capital punishment, the death penalty is but one of many areas in which the Russian Federation must implement major reforms. The Council will not be satisfied with Russia's performance until the state ratifies and acts upon a string of conventions in the following areas: a convention banning torture, respect for social rights, reform of the prison system, prosecution of human rights violations during the Chechnya conflict, and various others.⁵⁷ Currently, Russia continues to ignore many of these obligations. For example, the Council has asked that Russia discontinue the use of torture as a mechanism to obtain confessions from prisoners, a feature of Soviet Russia. On May 5, 1998, Russia ratified the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment.⁵⁸ However, the Criminal Code of June 1996, adopted after Russia became a member of the Council, is still in effect. The Code retains specific provisions that authorize the use of physical force, even excessive force if necessary, by the police in the commission of their duties.⁵⁹

Clearly, the most important of the Federation's obligations is the complete abolition of the death penalty as demanded by Protocol No. 6, the

⁵³ Barry & Williams, *supra* note 27, at 244.

⁵⁴ *See id.* at 245.

⁵⁵ *See id.*

⁵⁶ *See* Vladimir Yemelyanenko, *Humaneness is Too Expensive*, MOSKOVSKIYE NOVOSTI, Sept. 28 – Oct. 5, 1997, at 11.

⁵⁷ *See* Council of Europe Press Service, *The Assembly Notes Russia's Progress but Decides to Continue the Monitoring Process* (June 22, 1998) (visited Sept. 14, 1999) <[http://www.coe.fr/cp/98/451a\(98\).htm](http://www.coe.fr/cp/98/451a(98).htm)> [hereinafter *Russia's Progress*].

⁵⁸ *See* Council of Europe Press Service, *Russia Ratifies the Human Rights Convention, the Anti-Torture Convention and the Charter of Local Self-Government*, (May 5, 1998) (visited Feb. 9, 1999) <<http://www.coe.fr/act/compass/cp98/314a%2898%29.html>>.

⁵⁹ *See* UGOLOVNIY KODEKS [UK] art. 38, 39, 40, 41, 42 (RF).

first step of which would be a moratorium on the carrying out of death sentences.⁶⁰ Russia did sign the Convention in May of 1998, but it has failed to ratify the Protocol as of yet. This failure is a significant sticking point in Russia's continued membership, and the Parliamentary Assembly of the Council has pledged to continue monitoring Russia's progress.⁶¹

Russia has made some progress, but it is still far from fulfilling all of its responsibilities to the Council. For example, the new criminal code contains only five capital offenses.⁶² The five offenses include a very vague reference to "especially grave crimes of attack on human life," infringement on life of state or public figure, infringement on life of person effectuating justice, criminal complicity, and use of violence against a representative of the authority.⁶³ This is a reduction from twenty-eight previous capital crimes.⁶⁴ However, it is not likely that those five articles will be eliminated any time soon. According to Article 57 of the criminal code, a life sentence may only be imposed as an alternative to capital punishment "for the commission of especially grave crimes of attack on human life" when a court deems it impossible to apply the death penalty.⁶⁵ The code does not provide guidance to determine when it is "impossible" to apply the death penalty. Therefore, the death penalty continues to be the punishment of first resort. With the current explosion of crime and continued public dissatisfaction with the government's failed efforts to contain it, Russia faces an uphill battle.

2. The Russian Justifications for the Death Penalty

President Yeltsin took a considerable risk in agreeing to a three-year moratorium on executions during an election year in order to gain favor with the Council, knowing he would not be able to sell the proposition

⁶⁰ See Svetlana Sukhova & Vitaly Dymarsky, *Europe Tries to Scare Russia with Death Penalty*, KOMMERSANT – DAILY, Jan. 31, 1997, at 2.

⁶¹ See *Russia's Progress*, *supra* note 57.

⁶² See UGOLOVYI KODEKS [UK RF] at art. 59, 67, 278, 296, 318, available in LEXIS.

⁶³ *Id.* arts. 59, 296, 67, 318; see also *Abolishing Death Penalty is Task of Yeltsin, Gov't, Duma*, Interfax Russian News, June 22, 1998, available in LEXIS, Russian News File.

⁶⁴ See *Abolishing Death Penalty is Task of Yeltsin, Gov't, Duma*, *supra* note 63. The following offenses may still warrant capital punishment in Russia: high treason, espionage, terrorist acts, terrorist acts against the representative of a foreign state in order to initiate war, banditry, inciting disorder in correctional institutions, manufacture or sale of counterfeit money or securities, deliberate murder in aggravating circumstances, rape, attempt on the life of a policeman, hijacking of an aircraft, resistance to or coercion of a military commander plus various military offenses. See Table II, Countries Whose Legislation Provides for the Death Penalty: Moldova, Russia (visited Feb. 11, 1999) <<http://www.coe.fr/features/kyiv/tableiiF.htm>>.

⁶⁵ See UGOLOVYI KODEKS [UK RF] art. 57.

either to the Duma or the public.⁶⁶ Yeltsin's commitment to the moratorium was questionable since its inception. Despite the unofficial moratorium, Russia continued to sentence prisoners to death with as much expediency as in the past.⁶⁷ Although the president had established the Death Penalty Review Commission in 1992, the efforts of the Commission quickly withered by the beginning of 1995, when Yeltsin commuted only five sentences and ordered 132 executions.⁶⁸ In previous years, the thirteen-member commission had successfully recommended commuting 340 sentences of 365.⁶⁹ In a surprising announcement made by Pristavkin on February 12, 1999, the Council was informed that all prisoners sentenced to death would have their sentences commuted to life terms by June 1999.⁷⁰ The announcement made no mention of where these prisoners would be housed. Nonetheless, Renate Wohlwend, rapporteur on the death penalty to the Council, was pleased with the initiative shown by President Yeltsin.⁷¹

The reasons for the continued support for the death penalty range from classical deterrence arguments to its justification due to the crime rate and even to economic explanations. Regardless of the particular justification, it is clear that abolitionist sentiment has not been a successful challenge to centuries of public and official support for the punishment.

In Russia, the death sentence was continuously abandoned and reinstated throughout history. Despite some abolitionist sentiment consistently present throughout Russian history since the fourteenth century, its "official" abolition has never lasted more than a few years.⁷² Elizabeth the Great was the first to abolish the death penalty, in 1753, but the ban remained in force for only a short time.⁷³ Since then, Russian leaders have instituted moratoriums or near moratoriums on executions, complete bans, temporary reinstatements, limitations on executions, and complete restoration of the death penalty throughout the country's history.⁷⁴ Abolitionist sentiment has still not taken root and is mostly an outside influence.

⁶⁶ See Barry & Williams *supra* note 27, at 243-44.

⁶⁷ See Amnesty International, *The Commitment to Abolish the Death Penalty Must Become a Reality*, M2 Presswire, Aug. 13, 1998, available in 1998 WL 16517577.

⁶⁸ See Scott, *supra* note 33.

⁶⁹ See *id.*

⁷⁰ See Council of Europe Press Service, *Death Penalty/Russia: Pardons Announced Just in Time* (Feb. 12, 1999) (visited Sept. 14, 1999) <[http://www.coe.fr/cp/99/81a\(99\).htm](http://www.coe.fr/cp/99/81a(99).htm)>.

⁷¹ See *id.*

⁷² See Kushen, *supra* note 32, at 527.

⁷³ See Barry & Williams, *supra* note 27, at 232.

⁷⁴ See *id.* at 232-33.

According to Russian officials, three main issues obstruct the abolition of the death penalty in the Federation today: a) the lack of legal grounds on which to refrain from carrying out death sentences, b) the economic costs of life imprisonment, and c) the overwhelming public support of capital punishment.⁷⁵

a. The Legal Justification

Russian legal experts contend that "when the executive branch [through the Death Penalty Review Commission] . . . pardons criminals on a large scale, it is supplanting the judicial branch."⁷⁶ President Yeltsin's Review Commission was established to address Europe's urgent recommendation that death row inmates be pardoned.⁷⁷ For a few years, the Commission served as an enforcement mechanism to allay the frustrations of the Council. The Commission is comprised of mercy-minded intellectuals who meet once a week to consider seven death penalty cases, as well as less serious criminal cases for indications of trial errors.⁷⁸ As mentioned earlier, the Commission's recommendations are now fairly ignored, as more and more prisoners are sentenced to death, their appeals to the commission forgotten or lost. Even the head of the Commission admits that "sometimes our nerves can't take it and we drink vodka at the table."⁷⁹ Given the President's open support for the death penalty and the Duma's insistent rejection of any attempt to abolish it, it is fair to say the Review Commission was instituted solely as a façade for the European community's benefit. Skuratov further argues that the judicial branch is an independent organ and cannot be superceded in this manner by the Executive.⁸⁰ This point stresses the importance of significant law reform the Council could promote in Russia to enable an independent party, whether it is a pardons commission or the president, to conduct a final appellate review of, in the least, the most disputable or affecting cases.

b. The Economic Justification

The Minister of Internal Affairs leads the economic justification for the death penalty. Life imprisonment and prison conditions as dictated by

⁷⁵ See Vladimir Yemelyanenko, *supra* note 56.

⁷⁶ *Id.*

⁷⁷ See Kraft, *supra* note 33. President Yeltsin signed an amendment to the penal code making it mandatory for him to examine all death sentences, thereby permitting him to grant clemency on a broad scale. See *Russia Likely to Keep Death Penalty Another Year*, AGENCE FRANCE-PRESSE, Jan. 12, 1998, available in 1998 WL 2198764.

⁷⁸ See Kraft, *supra* note 33.

⁷⁹ See Maura Reynolds, *In Russia, Ukraine, Dissent over Executions*, PHILADELPHIA INQUIRER, Feb. 22, 1998.

⁸⁰ See Yemelyanenko, *supra* note 56.

the Council, would cost the country 37.9 million rubles a year per prisoner (roughly \$1,609,342.00 USD).⁸¹ The Ministry insists that overall this would cost the federal budget nearly 400 – 550 billion rubles, an impossible figure for the government to meet.⁸² The flood of crime since the end of Communism has left the prison system unable to cope. According to one source, almost one in every 100 adult Russians is in prison.⁸³ Further, there are only 1000 prisons and penal colonies to house the one million-inmate population.⁸⁴ Some of these prisons were built as early as 1861.⁸⁵ From a rudimentary economic standpoint, Russia simply cannot afford not to execute criminals. One official estimated that Russia would have to build five or six more maximum-security prisons to house all the inmates.⁸⁶ Today, there is only one maximum-security prison in the country that could house lifers.⁸⁷ Prison conditions must definitely change if Russia is to meet international standards, but each year funds are depleted for other important uses.

c. The Moral/Political Justification

Finally, what lawmakers call the “moral standpoint” is their reference to public opinion with respect to the death penalty. The Russian public resolutely supports the death penalty. Some have suggested figures of as much as 90% support, and in some major cities the figure increases to an incredible 100%.⁸⁸ Even the chairman of the Death Penalty Review Commission, Anatoly Pristavkin recognized that “the bulk of the population . . . feels that executing criminals is the only efficient way of fighting crime.”⁸⁹

⁸¹ See *id.*

⁸² See *id.* Additionally, Vice Premier Boris Nemtsov submitted an assessment to the Duma on the costs of life imprisonment stating that currently there are 894 persons sentenced to death with 150 more added to the list each year. Nemtsov concluded that it will cost 580 million rubles each year for their maintenance. See Svetlana Sukhova, *It Is Cheaper to Execute Than to Pardon*, Russian Press Digest, June 4, 1998, available in LEXIS, Russia News File.

⁸³ See Bird, *supra* note 37.

⁸⁴ See Kraft, *supra* note 33.

⁸⁵ See *id.*

⁸⁶ See Helen Womack, *Russia's New Liberalism Fails Death Row Man*, INDEP. (London), Mar. 15, 1996.

⁸⁷ See Womack, *supra* note 37.

⁸⁸ See Yemelyanenko, *supra* note 56. Those cities where near 100% support for capital punishment include Nizhny Novgorod, Kemerovo, Irkutsk and seven other cities. See *id.*

⁸⁹ Kraft, *supra* note 84, at A7.

d. Additional Arguments: Deterrence, Retribution, History and Safety

The deterrence argument plays a significant role in Russia today. One prison warden believes the problem is that there are not enough executions.⁹⁰ Lt. Col. Vladimir Demidov, warden at a prison 300 miles south of Moscow, feels that the death penalty is definitely a deterrent, and that it is the "scourge of our society that more people aren't executed."⁹¹ The death sentence remains a powerful symbol of control in a society that is accustomed to an authoritarian rule that once provided citizens with security. Today, the death penalty seems to provide that security blanket that the State once provided.

To some degree, retributionist sentiment has taken root in Russian society as well. Despite revelations of historic abuse of the death penalty in Soviet Russia and even in modern-day Russia, the public, as well as public officials seem content to give convicted criminals what they deserve. It is difficult to find an excuse to pardon criminals such as Kostya Pavlov and Vasily Likhachov who savagely murdered a family of four in their home and then lived in the family's house for a week after the murder.⁹² Anatoly Vertoshkin, chief warden at Udmurtian penal colony No. 5, has said that individuals like these, are not people, "They are animals. Why should the state feed a child murderer? We need to get rid of these people."⁹³

Europe should not expect Russia to be eager to abolish the death penalty in the near future. The historical experiences of Europeans and Russians in the Development of their penal codes and theories of punishment have not been similar at all. The evolution of theories of punishment proposed by philosophers such as Voltaire and Rousseau and adopted throughout the whole of Europe were unsuccessful in 18th century Russia. Catherine the Great attempted to bring the Enlightenment to Russia only to find the peasantry unwilling to succumb to European thought.⁹⁴ She was forced to abandon her importation of Enlightenment ideas including abolition of capital punishment in order to address the peasant revolt.

The Russian people still retain lasting impressions of the KGB and Stalin era where, while the streets were safe from criminals, citizens were

⁹⁰ See *id.* at A6.

⁹¹ *Id.*

⁹² See Scott, *supra* note 28.

⁹³ *Id.*

⁹⁴ Cf. DIMITRI SERGIUS VON MOHRENSCHILDT, *RUSSIA IN THE INTELLECTUAL LIFE OF EIGHTEENTH CENTURY FRANCE* 248 (1936) (noting that many considered Russia a backward nation in the 18th century in many respects); Girish N. Bhat, *The Moralization of Guilt in Late Imperial Russian Trial by Jury: The Early Reform Era*, 15 *LAW & HIST. REV.* 77, 80 (1997) (noting that 19th century Russian reformers considered it both impossible and unwise to attempt to import European judicial practices into Russia).

not safe from the state itself.⁹⁵ However, as mentioned above, any anxiety they might feel regarding the past is largely offset by the current situation. Russians refuse to abandon the death sentence as an effective means to curtail and decrease crime.⁹⁶ Some consider crime the most important problem facing Russia.⁹⁷ Organized crime in Russia is ruthless and powerful. As much as 23% of Russians living in urban areas feel their country is run by the mafia which actually encourages its members to run for elective office.⁹⁸ The Russian crime groups take no prisoners, ruthlessly executing members of Parliament or uncooperative bankers in a Hollywood gangster-like show of force.⁹⁹ Many Russians, as well as respected Russian lawyers, believe that the personal safety of Russian citizens takes precedence over other personal liberties or rights.¹⁰⁰ Given the current situation, it is unlikely and unreasonable to expect the Russia will soon abandon the death penalty. Further, considering the fact that in early 1999, ten members of the Council had not yet ratified the Protocol,¹⁰¹ the Council's insistence on Russian compliance is somewhat debilitated by these members' records, and its credibility is likewise weakened.¹⁰² Russia is not the only Member State currently under fire regarding executions. Ukraine is in much the same economic, social and political position as its former big brother, but to a significant degree, Ukraine's failure to comply has been much more egregious than Russia's. The Council has handled the Ukrainian situation with little more than a severe tongue-lashing. The following case study of Ukraine's failure to comply with its commitments to the Council offers an example of the Council's apparent weakness and ineffectiveness in dealing with recalcitrant states.

⁹⁵ See Kushen, *supra* note 32, at 530-31.

⁹⁶ See *Despite Abolition Pledge, 70 Percent of Russians for Death Penalty*, DEUTSCHE PRESSE-AGENTUR, Dec. 4, 1997, available in LEXIS, DPA File.

⁹⁷ See Richard T. De George, "Sullivan-Type" Principles for U.S. Multinationals in Emerging Economies, 18 U. PA. J. INT'L ECON. L. 1193, 1193 (1997) (noting that Yeltsin considers crime to be Russia's biggest problem).

⁹⁸ See Scott P. Boylan, *Organized Crime and Corruption in Russia: Implications for U.S. and International Law*, 19 FORDHAM INT'L L.J. 1999, 2006 (1996).

⁹⁹ See *id.* at 2009.

¹⁰⁰ See Victor Shabalin et al., *The New Stage of the Fight Against Organized Crime in Russia*, Int'l Ass'n for the Study of Organized Crime (visited Sept. 7, 1999) <<http://oicj.acsp.uic.edu/spearmint/public/pubs/oc/10/01/newstage.cfm>>.

¹⁰¹ See Council of Europe Chart of Signatures and Ratifications, *supra* note 8.

¹⁰² In early 1999, these members were: Albania, Bulgaria, Cyprus, Latvia, Lithuania, Poland, Russia, Turkey, Ukraine, and United Kingdom. See *id.* Four of these nations have since ratified. See *id.*

D. Case Study: Ukrainian Non-Compliance and the Council's Response

Ukraine has been a member of the Council of Europe since November 9, 1995.¹⁰³ Like all members, Ukraine's accession into the Council carried with it the obligation to sign and ratify Protocol No. 6 of the Convention and carry out an immediate moratorium on executions.¹⁰⁴ Despite Ukraine's best efforts to circumvent, stall, or water down its obligations, the Council has paid close attention to the country's record. Ukraine is now in the awkward position of attempting to explain to the Council ministers why it has not only failed to institute a de jure moratorium since 1997,¹⁰⁵ but also continued to execute prisoners in secret through 1997.¹⁰⁶ Ukraine did institute a weak de facto moratorium in the wake of official reports revealing that 212 people were executed between November 9, 1995 (the date of Ukraine's accession to the Council) and March 11, 1997.¹⁰⁷ The country also signed Protocol No. 6 on May 5, 1997,¹⁰⁸ but has not yet ratified it. Furthermore, serious doubts as to Ukraine's commitment to the ratification of the Protocol as well as to the moratorium continue to plague the Council and hurt Ukraine's credibility. "I feel I cannot trust the Ukrainian authorities any more," admonished Renate Wohlwend, the council's Legal Affairs Committee Rapporteur.¹⁰⁹ Mrs. Wohlwend's job monitoring Ukraine's progress is made all the more difficult by the web of secrecy enshrouding official records kept by the Ministry of Justice and the Ministry of the Interior.¹¹⁰

Such blatant disregard for the promises made to the European organization have been met with disdain in the Council. However, since 1995, the Council has merely issued a series of warnings, threats, ultimatums, and resolutions without force. In 1997, the Council issued

¹⁰³ See Council of Europe Press Service, *13 Executions in Ukraine in 1997 – Now Moratorium in Place*, Nov. 7, 1997 (visited Sept. 21, 1999) <<http://www.coe.fr/cp/97/650a%2897%29.htm>>.

¹⁰⁴ See *id.*

¹⁰⁵ See Council of Europe Press Service, *Parliamentary Assembly Gives Ukraine a Stern Warning* (Jan. 28, 1999) (visited Sept. 14, 1999) <[http://www.coe.fr/act/compress/cp/99/55a\(99\).htm](http://www.coe.fr/act/compress/cp/99/55a(99).htm)>.

¹⁰⁶ See Renate Wohlwend, *Ukraine: Decision-time for the Assembly*, available in THE EUROPEANS (visited Sept. 13, 1999) <<http://www.coe.fr/magazine/te0198/session.htm>>.

¹⁰⁷ See *Parliamentary Assembly Gives Ukraine a Stern Warning*, *supra* note 105.

¹⁰⁸ See Council of Europe Chart of Signatures, *supra* note 8.

¹⁰⁹ See Wohlwend, *supra* note 106.

¹¹⁰ See *id.* Much of the information Mrs. Wohlwend has been forced to rely upon, whether through leaks in the administration or through relatives of executed prisoners, has later reluctantly been admitted by Ukrainian authorities who initially swiftly dismiss the rumors. See *id.*

Resolution 1112 whereby it demanded Ukrainian compliance, warning that it would "take all necessary steps to ensure compliance" and even "consider the non-ratification of the credentials of the Ukrainian parliamentary delegation."¹¹¹ Likewise in December 1998, the Council warned the Ukrainian delegation that it might be excluded from the Parliamentary Assembly in January 1999 due to failed compliance with the moratorium.¹¹² This, too, was an empty threat. Again, in December 1998, the Parliamentary Assembly Monitoring Committee adopted a draft resolution and recommendation urging the Assembly to annul the Ukrainian delegation's credentials and examine a possible suspension if Ukraine's commitments were not honored by June 1999.¹¹³ In yet another resolution in 1998, the Council not only continued to demand the complete abolition of the death penalty as well as a *de jure* moratorium, it also gave Ukraine specific instructions for reform of its prison system.¹¹⁴ These numerous threats, resolutions and warnings have made little impact on Ukraine's continued course of conduct.

In spite of tremendous discontent with Ukraine's record, the Assembly once again approved the delegation's credentials at the January 1998 meeting and opted instead to warn Ukraine that *next time* their credentials could be revoked.¹¹⁵ More recently, in January 1999, the Parliamentary Assembly unanimously decided that it would annul Ukraine's credentials and call for a suspension of the Ukrainian representation in the Committee of Ministers at the June 1999 session unless the country made substantial progress to fulfill its obligations.¹¹⁶

After more than three years of futile demands, the Council's credibility has been called into question by its own members. Wohlwend has claimed that the Council "always prefer[s] political dialogue to sanctions, but there are limits."¹¹⁷ These limits have not yet been made apparent. Even Wohlwend admits that "the Assembly must show that it does not accept to

¹¹¹ Resolution 1112 (1997) On the Honouring of the Commitment Entered Into by Ukraine Upon Accession to the Council of Europe to Put into Place a Moratorium on Executions (visited Sept. 7, 1999) <<http://www.coe.fr/ta/ta97/eres1112.htm>>.

¹¹² See Council of Europe Press Service, *Monitoring Committee Warning to Ukraine*, Dec. 2, 1998 (visited Sept. 21, 1999) <<http://www.coe.fr/cp/98/780a%2898%29.htm>>.

¹¹³ See *id.*

¹¹⁴ See Resolution 1145 (1998) Execution in Ukraine (visited Sept. 13, 1999) <<http://www.coe.fr/ta/ta98/eres1145.htm>>.

¹¹⁵ See Council of Europe Press Service, *Assembly Gives Ukraine Final Warning on Executions*, Jan. 27, 1998 (visited Sept. 7, 1999) <[http://www.coe.fr/cp/98/50a\(98\).htm](http://www.coe.fr/cp/98/50a(98).htm)>.

¹¹⁶ See Council of Europe Press Service, *Parliamentary Assembly Gives Ukraine a Stern Warning*, Jan. 28, 1999 (visited Sept. 21, 1999) <[http://www.coe.fr/cp/99/55a\(99\).htm](http://www.coe.fr/cp/99/55a(99).htm)>.

¹¹⁷ See Council of Europe Press Service, *Warning to Ukraine* (Dec. 16, 1997) (visited Sept. 14, 1999) <[http://www.coe.fr/cp/97/746a\(97\).htm](http://www.coe.fr/cp/97/746a(97).htm)>.

be lied to It is not enough to issue another warning; this would endanger the Assembly's credibility."¹¹⁸ During an emergency debate in January 1997, considering the failed commitments by Ukraine and Russia, several members of the Parliamentary Assembly pointed out that until the Council takes substantive steps against such disregarded obligations, other countries would also be unwilling to comply with the Protocol or enter into agreements in the future.¹¹⁹ Other members of the Council also noted the risk that continuing executions might undermine the credibility and integrity of the organization on the question of human rights.¹²⁰

The case of Ukraine is exemplary of the situation of other new Member States. Not surprisingly, of the ten members who have not yet ratified the Protocol, nine of them are in the midst of a transitional phase between Communism and democracy.¹²¹ At least one member of the Council has recognized the political difficulties these former Soviet states face and the impact the immediate abolition of the death penalty would produce.¹²² One member of the Italian delegation to the Assembly even admitted that, "Asking Russia and Ukraine to abolish the death sentence tomorrow would be like asking them to get rid of their governments tomorrow."¹²³

If the Council's own record of legislative proceedings is any indication of its strength of character, members such as Russia and Ukraine have little to fear. No Member State has ever been expelled for any reason whatsoever. Further, no Member State has ever had its credentials suspended at any moment. The mechanism by which to suspend or expel members is written into the founding Statute of the Council of Europe, but it has never been employed. Article VIII authorizes the suspension of any state which has "seriously violated Article III" which states:

Every member of the Council of Europe must accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms, and collaborate sincerely and effectively in the realisation of the aim of the Council as specified in Chapter 1.¹²⁴

Article VIII also permits the Committee of Ministers to request the Member State to withdraw pursuant to Article VII.¹²⁵ If the member then refuses to withdraw, Article VIII grants the Committee the power to declare

¹¹⁸ Wohlwend, *supra* note 106.

¹¹⁹ See *Executions of Death Sentences in Russia and Ukraine*, *supra* note 24.

¹²⁰ See *id.*

¹²¹ See Council of Europe Chart of Signatures and Ratifications, *supra* note 8.

¹²² See *Execution of Death Sentences in Russia and Ukraine*, *supra* note 24.

¹²³ *Id.*

¹²⁴ Statute of the Council of Europe, May 5, 1949, Europ. T.S. No. 51, art. 3. .

¹²⁵ See *id.* art. 8.

that the member has “ceased to be a Member of the Council.”¹²⁶ It seems the Council has had ample and fully justified opportunities to utilize the language of Article III to demonstrate cause for suspension or expulsion of members such as Ukraine under Article VIII. The fact that it has never employed Article VIII calls into question the Council’s commitment to its founding Statute and its bylaws.

In light of the number of conventions, agreements and other fundamental documents that many members have not yet signed and/or ratified, the Council’s unwillingness to employ Article VIII justifies many members’ nearly lethargic fulfillment of obligations. Some of the unsigned or unratified conventions date as far back as 1961 such as the European Social Charter, which to this date has not yet been signed by nine members nor ratified by eighteen states including Switzerland.¹²⁷ Other conventions that have not been signed or ratified by some members concern the very human rights the organization was formed to protect. For example, six years after its opening for signature, Italy had not yet ratified Protocol No. 1 to the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment.¹²⁸ Additionally, seventeen members including seven founding states, have not signed or ratified the Framework Convention for the Protection of National Minorities.¹²⁹ Not only have some members failed to sign or ratify fundamental human rights agreements, there are some conventions that have been signed only by a minority of states. One such agreement is the European Convention on the Exercise of Children’s Rights which has only been signed by fourteen of the forty members.¹³⁰ Finally, there are scores of treaties that even the founding members have failed to ratify.¹³¹ These treaties go as far back as

¹²⁶ *Id.*

¹²⁷ See Council of Europe: Chart of Signatures and Ratifications, European Social Charter, ETS No. 35, (visited Mar. 15, 1999) <<http://www.coe.fr/tablconv/35t.htm>>.

¹²⁸ See Council of Europe Chart of Signatures and Ratifications, Protocol No. 1 to the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, ETS No. 151, (visited March 15, 1999) <<http://www.coe.fr/tablconv/114t.htm>>. Italy has since then ratified the Protocol. See *id.*

¹²⁹ See Council of Europe: Chart of Signatures and Ratifications, Framework Convention for the Protection of National Minorities, ETS No. 157, (visited Sept. 21, 1999) <<http://www.coe.fr/tablconv/157t.htm>>.

¹³⁰ See Council of Europe: Chart of Signatures and Ratifications, European Convention on the Exercise of Children’s Rights, ETS No. 160, (visited March 15, 1999) <<http://www.coe.fr/tablconv/160t.htm>>.

¹³¹ See *Treaties of the Council of Europe Signed but Not Ratified by Belgium* (last modified June 23, 1999) <<http://www.coe.fr/eng/legaltxt/signstates/esignbelg.htm>>; *Treaties of the Council of Europe Signed But Not Ratified by France* (last modified Sept. 9, 1999) <<http://www.coe.fr/eng/legaltxt/signstates/esignfra.htm>>; *Treaties of the Council of Europe Signed But Not Ratified by the United Kingdom* (last modified June. 23, 1999) <<http://www.coe.fr/eng/legaltxt/signstates/esignuk.htm>>; *Treaties of the*

1955 and range from issues regarding the social protection of farmers to agreements regarding illicit traffic of narcotic drugs by sea.¹³²

The absence of signatures and ratifications is not solely the failure of the individual Member States, but of the parent organization as well. If the Council is not willing or able to compel some of its own founding members as well as the entire membership to fulfill their obligations, it will not succeed in asking newer members to commit themselves to the Council's agenda. The provisions of Article 8 should be used sparingly and carefully, but they certainly should not be ignored. Once the Council has so exhausted its means of persuasion, it should seek alternative solutions to the problem or simply commence measures pursuant to Article 8. In so doing and by eliminating useless and countless threats and ultimatums, the Council can avoid questions of credibility. If the Council continues its current course of action, however, it may be reduced to an institution with little more than a weak soapbox from which to beg cooperation from its members.¹³³

The following section will outline the alternatives to a complete and immediate abolition of the death penalty in the Russian Federation. These are options that either the Council or the Russian Federation or both may take in efforts to move Russia closer to a "European model."

II. ALTERNATIVE SOLUTIONS TO THE DILEMMA

A. *Possible Council Responses*

The first set of alternatives involves the Council's approach to Russia. It should be noted that the easiest solution is not the suspension of Russia's membership under Article 8 as previously discussed. Indeed, despite the death penalty issue, the majority of Member States do support Russia's membership.¹³⁴ Furthermore, suspension will not move Russia closer to abolishing the death penalty.

1. Eliminate the Requirement to Abolish the Death Penalty

The easiest but least likely solution to the Council's dilemma is for the Council to simply eliminate the requirement that Russia abolish the death penalty. This, of course, poses several problems for the Council. There are already reports that Council members feel the organization is diluting its entrance criteria and offering membership to countries that are clearly not yet qualified. If the Council eliminates this obligation altogether, it would

Council of Europe Signed But Not Ratified by Italy (last modified Aug. 11, 1999) <<http://www.coe.fr/eng/legaltxt/signstates/esignita.htm>>.

¹³² See *supra* note 131.

¹³³ See Adrian Porter, *Russia Joins Council of Europe*, DAILY TELEGRAPH (London), Feb. 29, 1996.

¹³⁴ See Macdonald, *supra* note 40, at 525.

have to afford each country the ability to rescind its obligation. Even without these concerns, in truth, this organization is purely a human rights institution, and currently at its core is the belief in freedom from the death penalty. The question would then become, what kind of credibility will the Council expect to retain if it abolishes an ideal which has for the past ten years been an overriding concern and is embodied in a legal instrument by which each member is bound?

2. Relaxing Russia's Membership Criteria

The second response to the problem is to ask that the Council temporarily relax its criteria for Russia. The Russian Federation has openly stated that it desires closer cooperation with the West and further integration into the European family. Russia's ultimate goal continues to be entrance into the E.U. If this is true, there is little doubt that Russia will do everything in its power, commensurate with its desire to join the E.U., to meet its obligations. If the Council remains determined to demand the abolition of the death penalty and is willing to help Russia accomplish this, Russia will achieve it. However, there can be no ultimatum.

The Council's continued demands and ultimatums are useless. Currently, Russia has until 1999 to abolish the death penalty or be expelled from the Council.¹³⁵ Russia is not yet in a position to abolish the death penalty. Rather than aid Russia toward a greater respect for human rights, such ultimatums serve to aggravate an already tense political situation and threaten societal instability. Further, ultimatums are ignored, and therefore, their credibility when later used is nullified. A threat is only as good as it is credible. As was illustrated by the case study on Ukraine, three years of threats and warnings have done little to change the situation.

An even more troublesome situation currently testing the Council's resolve to demand compliance from members are the recent statements by Albanian officials rescinding their commitments to abolish the death penalty by June 1999.¹³⁶ This country has not ratified the Protocol, but it did institute a de facto moratorium on execution upon its accession in 1995.¹³⁷ Albanian Justice Minister Thimjo Kondi said his government wants to keep the death penalty as a deterrent and will negotiate with the Council, so that they understand that, given the current situation in Albania, abolition is not feasible.¹³⁸ The situation in Albania is currently more

¹³⁵ See *Capital Punishment in Russia Survives Trend To Eliminate It*, ST. LOUIS POST DISPATCH, Sept. 21, 1997.

¹³⁶ See *Albania Reluctant to Kill Off Death Penalty*, Central Europe Online, Feb. 4, 1999, (visited Feb. 15, 1999) <<http://www.centraleurope.com/ceo/roundup/albfull01.html>>.

¹³⁷ See Resolution 1114(1997) On the Honouring of Obligations and Commitments by Albania (visited Feb. 7, 1999) <http://stars.coe.fr/index_e.htm>.

¹³⁸ See *Albania Reluctant to Kill Off Death Penalty*, *supra* note 136.

critical than in Russia.¹³⁹ In fact, the unrest and open violence in that country is so disturbing that even Mrteza Gjoko, the only Albanian currently on death row, says Albania should not abolish the death penalty.¹⁴⁰ Needless to say, the Council ministers are concerned and have issued a press release urging Albania to continue to uphold the current moratorium, saying that "any step back on this commitment would have serious consequences for Albania's membership. . . ."¹⁴¹ Thus begins what will probably be the first in a series of threats, ultimatums, and resolutions concerning Albania's future as a member.

It is true that the Council gave Russia three years to completely abolish the use of executions.¹⁴² What the Council did not take into account is that at the time that promise was made, there was an election on the horizon in Moscow. This should not suggest that the value of a promise is dependent upon the situation in which it was given. However, the Council should at least note that it would have been political suicide to insist on the abolition of the death penalty when one of Yeltsin's radical opponents, Vladimir Zhirinovskiy was promising to execute all gangsters.¹⁴³ The implications for further cooperation with the West had Zhirinovskiy been elected are unfathomable.¹⁴⁴ During this particular election year when crime was at a peak, the death penalty issue alone could have cost Yeltsin the presidency. Without Russian membership and Yeltsin's cooperation the Council would have no future influence over Russia, thereby missing its opportunity and mission in that country. It may take Russia longer than the Council would hope, but without the pressure of its membership obligations, Russia may never reach for abolition. Conversely, if the Council persists unreasonably

¹³⁹ Much like Russia, polls suggest that an overwhelming number of Albanians support the capital punishment. Albania's entire prison population escaped in 1998 during the civil unrest. *See id.*

¹⁴⁰ *See id.*

¹⁴¹ Council of Europe Press Service, *Albania: Parliamentary Assembly Concerned* (Feb. 1, 1999) (visited Feb. 11, 1999) <[http://www.coe.fr/cp/99/20a\(99\).htm](http://www.coe.fr/cp/99/20a(99).htm)>.

¹⁴² *See* David Hoffman, *Yeltsin Moves Gingerly to End Death Penalty*, WASH. POST, May 17, 1996, at A27.

¹⁴³ *See* Womack, *supra* note 86.

¹⁴⁴ The German press has gone so far as to call Zhirinovskiy "Russia's Hitler." *See* Kevin Fedarko, *Hello, I Must Be Going*, TIME, Jan. 10, 1994, at 34. Zhirinovskiy is a flamboyant nationalist who has promised to reclaim Alaska for Russia once he is elected president. *See id.* at 34-35. He is also an anti-Semite, angering the Anti-Defamation League when he proclaimed that "to survive" Russia and the U.S. could "set aside places in United States and Russian territory to deport this small but troublesome tribe." ADL Outraged by Zhirinovskiy's Call for Jewish Deportation, Press Release, Feb. 23, 1999 (visited Sept. 9, 1999) <http://www.adl.org/presrele/asint_13/2677_13.html>. Additionally, he is well-known for his passionate outbursts against Yeltsin and the United States. *See* Daniel Williams, *Zhirinovskiy Aid Mission: Comic Relief*, SEATTLE TIMES, Feb. 11, 1998, at A3.

it may push Russia further away from achieving the Council's goals. Therefore, a better solution to the Council's frustration is to relax its membership criteria for Russia. A relaxation of the obligations could entail an extension of the deadline set by the Council for the complete abolition of the death penalty along with further reductions in the number of crimes for which the punishment is used.

3. New Focus on Penal and Criminal Justice Reform

If Russia commuted all death sentences to life imprisonment tomorrow, what would it then do with those lifers? Where would they be housed? If housed in the other, already overcrowded prisons, would that not be a graver transgression of already shameful human rights violations? Therefore, the third possible solution is for the Council to shift the focus from the death penalty to penal and criminal justice reform.

While the death penalty is the salient issue for the Council, there are a myriad of other obligations Russia must also fulfill and to date is ignoring. Many of these criteria are issues that must be resolved before further discussion of the abolishment of the death penalty can proceed. For example, the Council has placed a premium on the abolition of the death penalty but has only left to a secondary role the restructuring of the penal system itself. The Council is attempting to skip a step toward abolition of capital punishment without first implementing an infrastructure to uphold and provide permanence for that step.

If the Council is truly committed to human rights in Russia as well as the abolition of the death penalty, there are a number of initial steps the Council should help Russia achieve before asking its government to ignore the overriding will of the Russian people. The process must begin with reform of the penal system and the criminal justice systems. Indeed, in very practical terms, Russia is still physically unable to attain the Council's lofty abolition goal. As will be explained below, there is much work to be done in Russia. The Council can take an active role in remedying Russia's situation. Indeed, as the bastion of human rights in Europe, the Council has an obligation to help its newest member achieve the goals of the organization.

B. Proposals for Russia's Approach

Russia also has three options with which to address the Council's concerns, the first of which is highly unlikely. Russia's success will rest on the second suggestion which will entail the greatest commitment on Russia's part as well as extraordinary patience by the Council.

1. Abolition of Capital Punishment

The first is an obvious solution, and that is to abolish the death penalty. Not only is this economically impossible, it is politically implausible. The

elections in 1999 will probably not alter the political climate enough to encourage government officials to abolish capital punishment. Unless there is a sharp decrease in crime as well as rapid improvement in the prison system, Russian society will continue to opt for the death penalty as the appropriate punishment for the most heinous crimes.

2. Complete Reform of Russia's Prison and Criminal Justice Systems

The second option is to take steps to reform both its prison system and its criminal justice system, thereby addressing at least some of the Council's secondary concerns. Without these reforms the country cannot advance to the Council's ultimate objective. Russia has a wealth of knowledge and resources available within its own borders. Numerous non-governmental and nonprofit organizations as well as human rights groups, educators and clergy can be employed to assist in the criminal reform projects in the same manner in which they contributed to the development of the new constitution in 1993.

In September 1998, Russia took a step in reforming its prison system to the extent that it sought to decrease police cruelty toward prisoners. The government removed the prison system from the jurisdiction of the Ministry of the Interior, which oversees the police, and placed it under the jurisdiction of the Ministry of Justice instead.¹⁴⁵ Various human rights organizations had advocated this change in the hope that the use of torture by the police to extract confessions or testimonies for criminal cases would decrease.¹⁴⁶ Russia also signed and ratified the Council's convention against torture in 1997, which gives international inspectors the right to examine prisons and detention centers for abuses of power and signs of torture.¹⁴⁷ This problem is persistent in Russia, and this will be the first time the issue will be addressed. The Criminal Code itself contains only a brief definition of torture although it does forbid it.¹⁴⁸ Further, in 1997 alone there were 27,155 complaints against abusive police action including murder, rape and premeditated bodily harm.¹⁴⁹ Some commentators have suggested that these abuses stem from police detectives' lack of training as well as a lack of psychological screening for new officers.¹⁵⁰ Russia must

¹⁴⁵ See *Russia Proposes Penal Amnesty That May Free 100,000 Prisoners*, BALT. SUN, Oct. 7, 1998, at 16A.

¹⁴⁶ See generally Natalya Shulyakovskaya, *Kremlin Committee Tackles Police Torture*, MOSCOW TIMES, Apr. 8, 1998, available in LEXIS, News Library, Russia File (noting that human rights groups advocate change in police procedures and training aimed at reducing the use of torture).

¹⁴⁷ See *id.*

¹⁴⁸ See UGOLOVYI KODEKS [UK RF] art. 113.

¹⁴⁹ See Shulyakovskaya, *supra* note 146.

¹⁵⁰ See *id.*

take steps to follow up on these complaints as well as to ensure that mechanisms are in place whereby citizens can file complaints with receptive officials. Furthermore, the government can implement specific guidelines for the detention of citizens, interrogation rules and arrest procedures such as Miranda warnings.

Prison conditions in Russia are so alarming, some say that it is better to die than to live in prison. Anatoly Pristavkin, chairman of the president's Review Commission, considers life in prison "a delayed death sentence."¹⁵¹ In fact, Pristavkin claims that some prisoners ask to be put to death instead of being pardoned and sent to prison.¹⁵² Prisons in Russia are overcrowded and disease-infested. Prisoners are forced to share beds, sleeping in shifts.¹⁵³ As many as fifty percent of inmates are believed to be infected with tuberculosis.¹⁵⁴ In Moscow's largest and most infamous detention center, Matrosskaya Tishina, one prisoner claimed he would prefer a labor camp to prison.¹⁵⁵ Valery Abramkin, a leading human rights activist in Moscow who spent six years in a Soviet prison, insists that even in Soviet prisons under Stalin, the conditions did not compare to what inmates experience today.¹⁵⁶ As of 1997, inmates are now entitled to forty-three square feet of space, an increase from twenty-seven square feet allowed previously.¹⁵⁷

Conditions such as these are only part of the reason the Federation cannot abolish the death penalty as quickly as Europe would prefer, because the solution to the death penalty debate implies that prisoners would be given life sentences in institutions that are already unfit for human survival.

Perhaps more frightening than the prison system itself is the criminal justice system. From the initial arrest until the sentencing, the process is staggeringly grim. Close to 300,000 inmates await trial.¹⁵⁸ The time they will spend in prison before trial is entirely uncertain. According to Justice Minister Pavel Krasneninnikov, there are no legal limits on how long a person can be detained before a trial.¹⁵⁹ The average detention is ten months,¹⁶⁰ but some reports allege that a person can wait as long as four

¹⁵¹ See Reynolds, *supra* note 79.

¹⁵² See *id.*

¹⁵³ See Alessandra Stanley, *Russians Lament the Crime of Punishment*, N. Y. TIMES, Jan. 8, 1998, at A1.

¹⁵⁴ See *id.*

¹⁵⁵ See *id.*

¹⁵⁶ See *id.* at A1, A6.

¹⁵⁷ See *id.* at A6.

¹⁵⁸ See *id.* at A1.

¹⁵⁹ See *About 1000 People in Russia Face Death Penalty*, Interfax Russian News, Aug. 12, 1998, available in LEXIS, Country & Region (excluding U.S.) Library.

¹⁶⁰ See Stanley, *supra* note 153, at A6.

years before going to trial.¹⁶¹ The problem is that while prosecutors are required to complete their investigations within two years, there are no time limits for judges to hear the cases. Therefore, judges may leave detainees in prison indefinitely.

Once the accused is finally heard in court, the ordeal does not improve. Because Russia follows the inquisitorial model, judges are required to perform much of the information-gathering that would normally be done by the lawyers in the adversarial system. Russia has a conviction rate of almost 100% due in part because the judge must do an enormous amount of work such as solicit witness and expert testimony, review evidence and request information before he can acquit.¹⁶² Judges have little incentive to do anything beyond minimal work. Unlike other countries, being appointed as a judge is not an illustrious position to hold in Russia. In 1997 judges finally received a salary raise of 65% to bring them up to \$550 a month.¹⁶³ With these wages, it not surprising that one-third of the benches in Moscow courts are vacant and many posts are filled by junior lawyers.¹⁶⁴ Furthermore, the courts are consistently battling corruption, which has led to more than 322 judges being ousted from their positions in the last three and a half years.¹⁶⁵ Corruption will continue to be a factor as long as there are supplemental sources of income available to judges. For example, granting bail is a novelty that is granted to less than 2% of the accused, "usually to mobsters who have ready cash and connections to a compliant judge."¹⁶⁶ The physical conditions of the courts themselves indicate further reasons why judges are remiss in their duties. Some court buildings have no heat,¹⁶⁷ and most have no computers to aid judges in quickly accessing relevant precedent and law.¹⁶⁸

Once the prisoner has been sentenced to death, he will usually spend some time in a maximum security prison awaiting his fate. The prisoner has no idea when or where he will be executed. Execution is a simple and inexpensive procedure: a simple shot to the back of the head.¹⁶⁹ The bodies are cremated and the prisoner's family is not permitted to recover the

¹⁶¹ See *id.* at A1.

¹⁶² See *id.* at A6.

¹⁶³ See Stem Graft, *Spend More on Courts*, MOSCOW TIMES, July 31, 1997, available in LEXIS, News Library, Russia File .

¹⁶⁴ See *id.*

¹⁶⁵ See *id.*

¹⁶⁶ See Stanley, *supra* note 153, at A6.

¹⁶⁷ See Irina Dmitrievna, *Court Staff to Quit over Firing Threat*, MOSCOW TIMES, Oct. 20, 1995, available in LEXIS, News Library, Russia File.

¹⁶⁸ See Stem Graft, *Spend More on Courts*, *supra* note 164.

¹⁶⁹ See Kraft, *supra* note 33, at A1.

ashes.¹⁷⁰ Prisoners are not told until the second before they are shot that they are about to be executed in order to avoid "panic or stress."¹⁷¹ The procedure seems rather crude and ad hoc, but prisoners have repeatedly asked to be executed rather than endure the long, agonizing, and inhumane walk down the path to death row. Clearly, the most pragmatic and productive solution to the Russian dilemma is a massive overhaul encompassing all aspects of criminal law and procedure.

3. Ignore the Council for the Time Being

The final option seems the most likely to occur, at least for the time being. Russia may choose to retain the death penalty, employ it when appropriate and ignore the Council's demands certainly until the ideological tide of the Russian public has changed or until crime is curbed. Russia could take the risk and ignore the Council a while longer in the way Romania has done for the past five years. As a member of the Council, Romania, too, was asked to sign a ban on torture, but the country has still been accused of persecution and torture of political prisoners.¹⁷² The foreign minister of Romania made no excuses, asserting that his country simply could not agree with the Council's requirements.¹⁷³ The Council's credibility was severely criticized when its response was merely an expression of concern at the lack of legal reform.¹⁷⁴ There is some support among Russian government officials for the abolition of the death penalty. These supporters are Russia's representatives to the Parliamentary Assembly who have attempted to influence the Duma's discussions on the topic. These abolitionists are not in the majority among their peers in the Russian parliament. As a solution, ignoring the Council's many demands and warnings will entail the least effort but it will also incur the greatest risk to Russia's national and international interests.

III. CONCLUSION

In order to move the Russian Federation to a point with which the European community can comfortably welcome Russia, Europe must redirect its energies and help Russia develop a penal system and a criminal justice system that is more closely aligned with what are considered generally accepted standards within the contexts of human rights in Europe and the West. This is by far a better alternative than threatening Russia with expulsion.

¹⁷⁰ *See id.*

¹⁷¹ *See id.* at A6.

¹⁷² *See* Porter, *supra* note 133.

¹⁷³ *See id.*

¹⁷⁴ *See id.*

The Council should refocus its efforts not because all of the current outcomes attained are inherently incorrect or, by European standards "unconscionable," but because the processes often obscure the goals of the justice system. Perhaps, then, abolition of the death sentence will follow, but it is useless to demand that Russia place the cart before the horse. If the processes themselves are flawed or suspect, society may be cheated from just or equitable results, whether the result is life imprisonment or death.

Russia should not be expelled from the Council. Russia's main objective in seeking membership to the Council of Europe was to use it as a vehicle toward closer ties with the E.U. Assuming membership and approval from the Council is a stepping stone, Russia will now try to join the E.U. It will not succeed in the near future. The European Union does not expect to expand within the next few years.¹⁷⁵ Currently, the E.U. is preparing for January 1999 when the economic union will take place. Any future expansion plans will necessarily depend on the outcome of the union. If Russia is to have a chance at membership into the E.U., it cannot afford to lose its membership in the Council of Europe. It would behoove Western Europe to reign in the Russian Federation and other former Soviet states in order to ensure future closer ties with these states, whether in the form of E.U. membership or otherwise and to continue to further the Council's human rights goals.

There is some controversy over Russia's current membership, as well as questions regarding the Federation's commitment to issues like the death penalty. It is true that by some accounts over forty Russian Federation laws contradict the Council's Human Rights and Basic Freedoms Convention.¹⁷⁶ It is also true that the Minister of Justice has made numerous statements regarding the unlikelihood that Russia will abolish the death penalty.¹⁷⁷ Similarly, the Russian delegation to the Council has yet to express the determination the Council expects for compliance on the many obligations the Federation has yet to fulfill, and many European delegates to the Council have openly accused Russia of making empty promises.¹⁷⁸ Many of the Russian representatives are abolitionists, but there is little they can do to influence the decision-makers in Moscow. It is understandable that the Council is impatient with Russia after almost three years since the

¹⁷⁵ Cf. Blocker, *supra* note 17 (noting the likelihood that E.U. membership for some Eastern European nations could take two decades).

¹⁷⁶ See Duma Ratifies Human Rights Convention, Keeps Death Penalty, *supra* note 44.

¹⁷⁷ Justice Minister Pavel Krashennikov has contradicted himself in the media on numerous occasions. On at least two occasions, Krashennikov stated that it was premature for Russia to abolish the death penalty and that Russia should preserve it because of the current crime situation. See Sukhova, *supra* note 82. Yet, as a condition of admission to the Council of Europe, the Russian government agreed to abolish the death penalty. See Stanley, *supra* note 153, at A6.

¹⁷⁸ See Mikheyev, *supra* note 49.

Federation was granted membership. However, if the Council hopes to bring Russia closer into the European community, threats of expulsion will not achieve that goal. More importantly, if the Council hopes to bring about, as the ultimate result, the abolition of the death penalty, Russia should not be expelled from the Council. This would almost assure retention of the punishment for a much longer period of time than may otherwise be the case under European influence.

As it stands, the Council's threats have thus far fallen on deaf ears in the Duma. But even the Duma realizes the importance of maintaining ties with western Europe. As one government official said, "Membership in the Council of Europe definitely meets the interests of Russia."¹⁷⁹ If the Federation is expelled from the Council, not only will it be humiliated, but will lose an initial opportunity to further link itself to European trade.

Furthermore, considering the Council's attitude toward other founding nations including Great Britain, who has yet to eliminate the death penalty from its statute books, the Council loses some credibility by demanding that Russia sign the Protocol immediately.¹⁸⁰ Russia legitimately complains that the Council has been excessively pushy with the Federation and that the Council maintains a double standard considering the fact that the Parliamentary Assembly of the Council of Europe literally waited decades for Great Britain to sign Protocol No. 6, banning the death penalty.¹⁸¹ One Russian minister to the Parliamentary Assembly of the Council noted during a debate that the abolition of the death penalty must take a number of years, otherwise, the punishment would have been abolished in all the original Member States immediately after the Council's creation in 1949.¹⁸² In fact, by early 1999, there were still nine other members that had yet to ratify the Protocol and five members that had not yet signed it.¹⁸³

The current Russian criminal and social crisis creates an added difficulty for compliance with the Council's immediate demands.¹⁸⁴ As one Russian member of the Council implored, "[m]ore caution [is] needed. If

¹⁷⁹ See *Duma Ratifies Human Rights Convention, Keeps Death Penalty*, *supra* note 44.

¹⁸⁰ See Owen Bowcott & Stephen Bates, *End of the Line for Death Penalty*, *GUARDIAN* (Manchester, England), Oct. 4, 1997.

¹⁸¹ See Sukhova & Dymarsky, *supra* note 60. Many other members of the Council have also failed thus far to ratify or sign the Protocol, including Malta and Cyprus. Additionally, several other states are merely de facto abolitionists, not having removed the death penalty from their statutes: Belgium, Turkey, Latvia, Albania, Estonia, and others. Great Britain retains the death penalty for offenses dating back to 1351 such as murdering the Monarch and killing the Lord Chancellor. See Bowcott & Bates, *supra* note 181.

¹⁸² See *Execution of Death Sentences in Russia and Ukraine*, *supra* note 24.

¹⁸³ See Council of Europe Chart of Signatures and Ratifications, *supra* note 8.

¹⁸⁴ See generally Joseph M. Jones, *Russia's Trial by Fire*, *CRIM. JUST.*, Summer 1995, at 8, 9 (recognizing the "enormity and complexity" of the changes occurring in Russia).

the Council of Europe were to apply sanctions, it would lead to hardship [I]t [is] important not to destabilise an already unstable position."¹⁸⁵ Even if the death penalty is truly not a significant deterrent in Russia, there is something to be said for the psychological comfort citizens derive from believing that the punishment is a tool for crime-control. Indeed, Russians yearn for the authorities to be tough on crime, perhaps a socio-historical as well as psychological comfort to those who remember the crime-free Stalin era.¹⁸⁶ While this may not be an acceptable justification for the Council of Europe, Russia must deal with these political and social realities.

As stated earlier, the polls suggest that the overwhelming majority of Russians support the death sentence.¹⁸⁷ If this is so, Russia not only faces a social dilemma, but a legal one as well. Can the Council ask the Russian government to implement a new law that directly contradicts public sentiment almost unanimously? Considering the fragile political state of the government, the abolition of the death penalty is not merely a simple change in a country's penal code, but a dangerous risk to political stability in an already fragile environment. While the Council should help Russia develop procedural postures that may later develop into discussions of appropriate sentencing, it should also realize that, as with all international covenants, compliance and enforcement are only as effective as the parties agree they are. Russia is a sovereign nation whose most important constituency is not at the seat of the Council in Strasbourg but at home. The Council should not be so inflexible so as to ignore its members' specific situations.

Finally, membership into the Council is voluntary; therefore, the Council can legitimately mandate specific compliance from its members or establish prerequisites for membership. There is even some indication that the death penalty is not a critical issue for membership to the European Union.¹⁸⁸ For example, Britain's ambassador to the European Union has stated that keeping capital punishment in Estonian laws is not necessarily an obstacle to entry into the E.U.¹⁸⁹ If the abolition of the death penalty is not a priority for membership to the E.U., then perhaps the Council need not inflate the issue at this time. Furthermore, if Russia is unable to fulfill obligations that the Council finds truly imperative then the Council should

¹⁸⁵ *Execution of Death Sentences in Russia and Ukraine*, *supra* note 24.

¹⁸⁶ See Womack, *supra* note 86; see also Kushen, *supra* note 32; Reynolds, *supra* note 79.

¹⁸⁷ See Maura Reynolds, *Russian, Ukrainian Presidents Face Uphill Battle to Abolish Death Penalty*, DALLAS MORNING NEWS, Feb. 15, 1998.

¹⁸⁸ See *British Ambassador: E.U. Does Not Insist on Abolition of Death Penalty in Estonia*, Baltic News Service, Mar. 9, 1998, available in 1998 WL 8546712 (proposing that it is likely Estonia would still be seriously considered for membership to the E.U. despite its retention of the death penalty).

¹⁸⁹ See *id.*

also reconsider the membership status of several other members who have likewise failed to honor their commitments. If the council is not willing to review other's memberships, then what Russia may be dealing with is a regional bully instead of an organization dedicated to the betterment of the European states and the protection of human rights.

